

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

)
DePuy Mitek, Inc.)
a Massachusetts Corporation)
)
Plaintiff,)
)
v.) Civil Action No. 04-12457 PBS
)
Arthrex, Inc.)
a Delaware Corporation, *et al.*)
)
Defendants.)
)

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE AS
UNTIMELY DEPUY MITEK'S RESPONSE TO DEFENDANTS' OBJECTIONS TO
MAGISTRATE'S ORDER GRANTING DEPUY MITEK, INC.'S MOTION TO
PRECLUDE ARTHREX, INC. AND PEARSALLS, LTD. FROM SUPPLEMENTING
THEIR EXPERT REPORTS AND DEPOSITIONS, OR IN THE ALTERNATIVE,
MOTION TO REPLY THERETO**

Dated: December 4, 2006

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I. INTRODUCTION

Defendants Arthrex, Inc. (“Arthrex”) and Pearsalls, Ltd. (“Pearsalls”) (together, “defendants”) submit this memorandum in support of their motion to strike as untimely DePuy Mitek, Inc.’s (“DePuy Mitek’s”) response to defendants’ objections to Magistrate’s Order granting DePuy Mitek’s motion to preclude defendants from supplementing their expert reports and depositions (“Mitek Resp.”), or in the alternative, to reply thereto.

II. DEPUY MITEK’S RESPONSE TO DEFENDANTS’ OBJECTIONS TO THE MAGISTRATE’S ORDER SHOULD BE STRICKEN AS UNTIMELY

Pursuant to Fed. R. Civ. P. 72(a), Arthrex filed its objections to the Magistrate’s Order on November 2, 2006. According to Local Rule 7.1(b)(2), DePuy Mitek had fourteen (14) days -- *i.e.*, until November 16, 2006 -- within which to file a response to Arthrex’s objections to the Magistrate’s Order. DePuy Mitek failed to do so, waiting until 4 days later, and thus, its response should be stricken as untimely. *Hutchins v. Cardiac Science, Inc.*, 2006 WL 2942790 at *4 (D. Mass. Sept. 29, 2006) (Ex. 1); *Cook v. McLaughlin*, 917 F.Supp. 79, 81 (D. Mass. Feb. 29, 1996).

In *Cronin v. Commonwealth of Massachusetts*, 2004 WL 224565 at *1 (D. Mass. Feb. 5, 2004) (Ex. 2), this Court denied a motion for reconsideration for allowing a motion to dismiss where the plaintiff failed to timely file an opposition, in violation of Local Rule 7.1(b)(2). *Id.* The *Cronin* court stated that in deciding a motion to strike under Local Rule 7.1(b)(2), the court may “consider its institutional interest in preserving the integrity of its rules of procedure. Valid local rules are an important vehicle by which courts operate. Such rules carry the force of law . . . and they are binding upon the litigants and upon the court itself.” *Id.* (citing *Air Line Pilots Association v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 224 (1st Cir.1994)). The *Cronin* court also cited *Ramsdell v. Bowles*, 64 F.3d 5, 8 (1st Cir. 1995), which confirmed the propriety

of striking an opposition to a summary judgment motion filed *just one day late* in violation of the district court's local rule. *Cronin*, 2004 WL 224565 at *1.

In the December 1 discussion before the filing of this motion, DePuy Mitek expressed its belief that its response was timely because it thought that it had 3 days since defendants' objections were electronically served. That is wrong, as Local Rule 7.1(b)(2) could not be clearer. Specifically it sets 14 days for a response regardless of how service is made.¹ Moreover, to the extent DePuy Mitek blames its tardiness on its ignorance of the local rules of this Court, that is no excuse. As this Court explained in *Cronin*, such "inattention falls far short of any showing of an excusable failure." *Id.*

Further, DePuy Mitek asserted that Local Rule 7.1(b)(2) applies to responses to motions only and does not govern responses to objections filed pursuant to Fed. R. Civ. P. 72(a). DePuy Mitek is just wrong. The fact is that Local Rule 7.1(b)(2) is the *only* rule that could apply since Fed. R. Civ. P 72(a) is silent on the timeframe for filing a response when the Magistrate ruled on non-dispositive matters, such as here. For these reasons, Depuy Mitek's response to Arthrex's objections should be stricken.

III. SHOULD THE COURT NOT STRIKE AS UNTIMELY DEPUY MITEK'S RESPONSE TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE'S ORDER, DEFENDANTS SHOULD BE PERMITTED TO REPLY THERETO

In the event the Court denies defendants' motion to strike DePuy Mitek's response, defendants move, in the alternative, to reply thereto. DePuy Mitek's response includes factual inaccuracies designed to mislead the Court and also introduces several new issues not raised by defendants in their objections to the Magistrate's Order.

For example, DePuy Mitek ignores what the Magistrate actually said during the hearing -- which clearly establishes that the Magistrate granted DePuy Mitek's motion because

¹ Further, D. Mass. ECF Administrative Procedure E(4) also makes clear that electronic service is to be treated the same as mail service under Local Rule 7.1(b)(2).

she believed that defendants did not definitively prove the existence of a virus. Instead, DePuy Mitek proffers several guesses as to why the Magistrate granted DePuy Mitek's motion. Mitek Resp. at 8-18. First, these guesses hazarded by DePuy Mitek were not included in defendants' objections to the Magistrate's Order, thus DePuy Mitek is not "responding" to anything to which defendants objected. Second, these guesses recklessly assert certain legal and factual inaccuracies to which defendants should be permitted to respond in the interest of fairness.

For example, in one of its guesses, DePuy Mitek incorrectly asserts that defendants failed to establish that Dr. Gitis' report contains a typographical error in reporting the suture diameter tested. Mitek Resp. at 10-13. That is just not true and all of the evidence in the case regarding suture diameter supports that there was a typographical error in Dr. Gitis' report. Defendants should be permitted to respond to this assertion.

In another example, DePuy Mitek asserts that defendants failed to show that Dr. Gitis' report contains an error in reporting the actual testing methodology used in conducting his pliability testing. Mitek Resp. at 13-16. Again, that is not true and defendants should also be permitted to respond to this assertion. DePuy Mitek never disputes the methodology Dr. Gitis used to conduct his pliability test. Moreover, it was DePuy Mitek that pointed out the actual method to Dr. Gitis at his deposition.

In addition, DePuy Mitek wrongly asserts that defendants have waived the ability to correct a typographical error related to the knot slippage strength testing performed by Dr. Gitis. Mitek Resp. at 16. This is incorrect and defendants should be permitted to respond. Dr. Gitis is well within the legal timeframe for identifying errors in his report.

Finally, DePuy Mitek desperately pieces together a makeweight prejudice argument. But this is nothing more than empty unilateral threats of spending by DePuy Mitek. Perhaps most egregiously, DePuy Mitek shamelessly attempts to leave the impression that Dr. Gitis'

correcting his report would somehow impact the dispositive motions now pending before the Court. Here again, this is just not true. Neither DePuy Mitek nor defendants relied on Dr. Gitis' testing in support of any of their respective dispositive motions, or in defense of any such motions. Defendants should be permitted to clarify the record on these issues as well.

IV. CONCLUSION

For the foregoing reasons, DePuy Mitek's response to defendants' objections to the Magistrate's Order granting DePuy Mitek's motion to preclude defendants from supplementing their expert reports and depositions should be stricken as untimely, or in the alternative, defendants should be given an opportunity to reply thereto.

Dated: December 4, 2006

Respectfully submitted,

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EXHIBIT 1



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Briefs and Other Related Documents

Hutchins v. Cardiac Science, Inc.D.Mass.,2006.Only the Westlaw citation is currently available.

United States District Court,D. Massachusetts.
Donald C. HUTCHINS, Plaintiff
v.
CARDIAC SCIENCE, INC., et al., Defendants.
C.A. No. 04-30126-MAP.

Sept. 29, 2006.

Background: Patentee brought action against former licensee of its intellectual property and corporation that allegedly acquired that license in asset purchase agreement, alleging copyright and patent infringement, abuse of process, and tortious interference with contract. After summary judgment was granted in favor of acquiring corporation, patentee moved for relief from judgment.

Holdings: The District Court, Michael A. Ponsor, J., held that:

(1) one defendant's payment of indemnity to the other was not admission as to the veracity of patentee's claims, but

(2) alleged infringer's misrepresentation that it possessed license rights to patentee's intellectual property, when in fact it had transferred those rights to a third party, entitled patentee to relief from summary judgment.

Ordered accordingly.

[1] Federal Civil Procedure 170A 2654

170A Federal Civil Procedure
170AXVII Judgment

170AXVII(G) Relief from Judgment

170Ak2651 Grounds

170Ak2654 k. Fraud; Perjury. Most Cited Cases

To prevail on a motion for relief from judgment on basis of misrepresentation of an adverse party, a movant must establish, among other things, that an alleged misrepresentation prevented him from fully and fairly presenting his case. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

[2] Injunction 212 138.18

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138.18 k. Likelihood of Success on Merits. Most Cited Cases

In order to allow a motion for preliminary injunctive relief, a court must conclude that the movant is likely to obtain ultimate judgment on the merits.

[3] Evidence 157 222(2)

157 Evidence

157VII Admissions

157VII(B) By Parties or Others Interested in Event

157k221 Parties of Record

157k222 In General

157k222(2) k. Statements as to Particular Facts in General. Most Cited Cases

Transferee corporation's demand for indemnity from transferor corporation when patentee sued it following transfer of patent license, and transferor corporation's payment of indemnity to transferee corporation, did not amount to admission by those corporations as to the veracity of patentee's claims for copyright and patent infringement, abuse of process, and tortious interference with contract.

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[4] Federal Civil Procedure 170A ~~2558~~

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2558 k. Judgment or Order.

Most Cited Cases

Interlocutory summary judgment order is subject to the district court's discretionary power to alter it at any time prior to the entry of the final decree.

[5] Patents 291 ~~323.2(5)~~

291 Patents
291XII Infringement

291XII(C) Suits in Equity
291k323 Final Judgment or Decree
291k323.2 Summary Judgment
291k323.2(5) k. Hearing and Determination. Most Cited Cases
Alleged infringer's misrepresentation that it possessed license rights to patentee's intellectual property, when in fact it had transferred those rights to a third party, entitled patentee to relief from summary judgment granted in favor of alleged infringer in action for patent and copyright infringement. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

Patents 291 ~~328(2)~~

291 Patents
291XIII Decisions on the Validity, Construction, and Infringement of Particular Patents
291k328 Patents Enumerated
291k328(2) k. Original Utility. Most Cited Cases

Patents 291 ~~328(4)~~

291 Patents
291XIII Decisions on the Validity, Construction, and Infringement of Particular Patents
291k328 Patents Enumerated
291k328(4) k. Reissue. Most Cited Cases
4,583,524, 5,913,685. Cited.
34,800. Cited.

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MEMORANDUM AND ORDER REGARDING PLAINTIFF'S MOTIONS FOR MISCELLANEOUS RELIEF (Dkt. Nos. 107, 108, and 191) PONSOR, D.J.

I. INTRODUCTION

*1 This is a suit brought by *pro se* Plaintiff Donald C. Hutchins against Cardiac Science, Inc. ("Cardiac Science") and Compliant Corporation ("Compliant"). Plaintiff alleges that Cardiac Science is liable for copyright and patent infringement, abuse of process, and tortious interference with contract.

Cardiac Science has denied Plaintiff's allegations and asserted counterclaims against Plaintiff seeking damages, certain declaratory judgments, and injunctive relief.

Plaintiff has filed three motions presently before the court. Two of these motions are fairly straightforward. For the reasons set forth below, the court will: (1) deny Plaintiff's Motion for Relief from the Court's September 28, 2005 Order Denying His Emergency Motion for a Temporary Restraining Order (Dkt. No. 107); and (2) deny Plaintiff's Motion for Sanctions Against Counsel for Cardiac Science (Dkt. No. 191).

The third motion, Plaintiff's Motion for Relief from the Court's June 23, 2005 Order Allowing Cardiac Science's Motion for Summary Judgment (Dkt. No. 108), raises disturbing issues. Plaintiff contends, and Cardiac Science now appears to concede, that Cardiac Science made repeated misrepresentations regarding its possession of certain license rights to Plaintiff's intellectual property, when it knew that these license rights, in fact, had been transferred to a third party. Because these misrepresentations have

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generated serious questions about Cardiac Science's entitlement to summary judgment on any of Plaintiff's claims, the court will, upon reconsideration, deny Cardiac Science's motion and set the case for a scheduling conference to determine future proceedings.

II. BACKGROUND ^{FN1}

On June 1, 1994, Plaintiff and his closely-held company, CPR Prompt Corporation ("CPR Prompt"), entered into a license agreement (the "License Agreement") with County Line Limited Partnership ("County Line"). Under the terms of this agreement, Plaintiff and his company provided County Line with an exclusive license to various intellectual properties, including CPR Prompt®-a device designed to instruct individuals in the performance of cardiopulmonary resuscitation.^{FN2} (See Dkt. No. 56, Ex. 1, License Agreement.)

Pursuant to § 3.10 of the License Agreement, County Line also agreed to assign its interest to an "Affiliate" that would cause each partner of such Affiliate who purchases or otherwise acquires a partnership interest of such Affiliate directly from such Affiliate to agree to pay CPR-PROMPT seven and one-half percent (7.5%) of the net proceeds of any sale of any or all of such partnership interest to any person or entity which is not an Affiliate to such partner.

(License Agreement § 3.10.)

On September 19, 1994, County Line assigned all of its rights and obligations under the License Agreement to CPR Limited Partnership ("CPR L.P."), an Ohio entity that initially had two partners: Catalog Products, Inc., a 1% limited partner, and County Line itself, the 99% general partner.

*2 In December, 1997, County Line's corporate successor transferred its general partnership interest in CPR L.P. to CPR Prompt LLC, which subsequently converted to Compliant, a Delaware corporation. Like the previous general partners, Compliant retained a 99% partnership interest in CPR L.P. and performed various services related to

the License Agreement.

On October 21, 2003, unbeknownst to Plaintiff, Compliant and CPR L.P. entered into an Asset Purchase Agreement ("APA") with Cardiac Science. Under the terms of the APA, Compliant, as the general partner of CPR L.P., caused CPR L.P. to convey to Cardiac Science all of its "assets, properties, rights, and interests," including the License Agreement. (See Dkt. No. 56, Ex. 3, Asset Purchase Agreement § 1.1A.) Compliant also transferred to Cardiac Science "substantially all of [its] assets, properties, rights and interests," but retained its general partnership interest in CPR L.P. (Id. at § 1.2(i).)

In return, Compliant received \$47 million in Cardiac Science common stock. (Dkt. No. 40, Ex. H, Wedbush Morgan Securities Report 4, Oct. 29, 2003.) According to Plaintiff, in November of 2003, Cardiac Science began to manufacture and sell products covered by Plaintiff's patents and bearing the CPR Prompt® trademark. (Dkt. No. 40, Ex. L., Hutchins Aff. ¶ 12, July 1, 2004.)

In the spring of 2004, Plaintiff noticed that he had not received any royalty payments or reports from Compliant since the previous summer. (Id. at ¶ 8.) When Plaintiff called Compliant's Cleveland headquarters he discovered that CPR L.P.'s general partner was no longer in business. (Id.)

Plaintiff subsequently contacted the law firm of Fish & Richardson and learned that Compliant, for the first time since 1995, had recently failed to pay certain fees related to Plaintiff's patents. Under the circumstances, Plaintiff concluded that Compliant had abandoned his intellectual properties, and he began discussing the possibility of licensing these properties to another entity. (Id. at ¶ 9.)

On April 29, 2004, Plaintiff received a phone call from Attorney Randall Skaar, a representative of Cardiac Science, who informed Plaintiff that Cardiac Science had acquired his intellectual properties. (Id. at ¶ 11.) After familiarizing himself with the terms of the APA, Plaintiff concluded that the 7.5% exit payment described in § 3.10 of the License Agreement had been triggered. On July 2,

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2004, in response to Cardiac Science's refusal to recognize his right to an equity interest of \$3,525,000, Plaintiff filed his original complaint against Cardiac Science, alleging: copyright infringement (Count I); patent infringement by means of sales (Count II); patent infringement by means of manufacture (Count III); negligence (Counts IV and V); and breach of contract (Count VI).^{FN3}

It now appears undisputed that on August 11, 2004, Cardiac Science conveyed its interest in the License Agreement to Aristotle Corporation ("Aristotle"). (See Dkt. No. 210, Skaar Decl. ¶ 2.) This marked the second time in less than ten months that Plaintiff's intellectual properties were transferred without Plaintiff's knowledge or consent.

*3 On August 18, 2004, Plaintiff filed an *ex parte* emergency motion for a temporary restraining order in an attempt to prevent Cardiac Science from disbursing stock to Compliant pursuant to the APA. Two days later, on August 20, 2004, Cardiac Science filed its first brief in this action, opposing Plaintiff's emergency motion on the ground that Plaintiff had failed to show a substantial likelihood of success on the merits of his case. (See Dkt. No. 8). In this memorandum, Cardiac Science argued that it was "the exclusive licensee of the intellectual property at issue" and that therefore any claim for infringement was foreclosed, despite the fact that it had already conveyed these very licensing rights to Aristotle.

That same day, Cardiac Science filed a motion to dismiss based, in part, on the fact that "Cardiac Science is the exclusive licensee to the intellectual property allegedly infringed." (Dkt. No. 10, Cardiac Science's Mem. Supp. Mot. Dismiss 1.) On August 24, 2004, in response to Plaintiff's second motion for a temporary restraining order, Cardiac Science once again characterized itself as "the exclusive licensee of the intellectual property at issue" and therefore, it claimed, Cardiac Science "[could] not be an infringer." (Dkt. No. 13, Cardiac Science's Mem. Opp'n Pl.'s Second Mot. TRO 2.)

The court heard argument on three motions on September 9, 2004, including Cardiac Science's

motion to dismiss. During oral argument, Attorney Skaar stated that "Cardiac Science continues to pay [Plaintiff] royalties under the [License] [A]greement. So we think that we own that." (Hrg Tr. 36:7-9, Sept. 9, 2004.)^{FN4}

On September 22, 2004, Cardiac Science filed an answer denying Plaintiff's allegations and asserting counterclaims for: breach of contract (Count I); abuse of process (Count II); tortious interference with the APA (Count III); tortious interference with the License Agreement (Count IV); interference with prospective advantage (Count V); and attorney's fees under 35 U.S.C. § 285 (Count VI). In addition, Cardiac Science requested declaratory judgments establishing: its compliance with the terms of the APA (Count VII); its non-infringement of Plaintiff's intellectual property rights (Count VIII); and its rights as a licensee under the APA (Count IX). Cardiac Science also sought preliminary and permanent injunctive relief, enjoining Plaintiff from continuing to: (i) assert an ownership interest in certain intellectual property; (ii) allege infringement on the part of Cardiac, its customers, and/or prospective customers; and (iii) breach the License Agreement (Count X).

On December 22, 2004, pursuant to an order allowing Plaintiff's Rule 19 motion to join Compliant, Plaintiff filed an eight-count amended complaint asserting claims of copyright infringement (Count I), patent infringement by means of sales (Count II), patent infringement by means of manufacture (Count III), abuse of process (Count VI), and tortious interference with contract (Count VII) against Cardiac Science, and claims of fraud (Count IV), fraudulent misappropriation and sale of patent (Count VI), and breach of contract (Count VIII) against Compliant. Notably, while Plaintiff's original complaint contained a breach of contract claim against Cardiac Science, he chose not to pursue this cause of action in his amended complaint.

*4 Cardiac Science once again denied Plaintiff's allegations and asserted the same counterclaims that it had set forth in response to Plaintiff's original complaint.

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On May 16, 2005, Cardiac Science moved for summary judgment on every claim brought against it by Plaintiff, as well as its declaratory judgment counterclaims. Cardiac Science then sent a letter to the court and Plaintiff dated June 13, 2005, in which it noted that the fourteen-day deadline for Plaintiff's opposition had passed, and Plaintiff had not yet offered a response. *See Local Rule 7.1(b)(2)* (requiring opposition to a motion within fourteen days after its service, "unless another period is fixed by rule or statute, or by order of the court").

On June 23, 2005, having heard nothing from Plaintiff in the face of counsel's letter, the court allowed Cardiac Science's motion for summary judgment based both on its merits and Plaintiff's failure to file a timely opposition. In response to this ruling, Plaintiff finally offered his opposition on June 27, 2005, sought relief from the court's ruling on June 29, 2005, and appealed the court's ruling on June 30, 2005.

The court denied Plaintiff's motion for relief on July 19, 2005. Plaintiff then filed another emergency motion for a temporary restraining order, which sought to compel Cardiac Science to: (1) pay Plaintiff all past due royalty payments; (2) reimburse Plaintiff for patent license fees; (3) meet all the ongoing requirements as the Licensee; and (4) transfer to Plaintiff the common stock shares and funds received by Cardiac Science as part of the June 28, 2004 demand for indemnity it served upon Compliant. (*See* Dkt. No. 97.)

After the court denied this motion for injunctive relief on September 28, 2005, Plaintiff filed a motion seeking relief from this ruling pursuant to Fed.R.Civ.P. 60(b)(3). On October 21, 2005, Plaintiff filed another Rule 60(b)(3) motion, which sought relief from the court's June 23, 2005 order allowing Cardiac Science's motion for summary judgment. Both Rule 60(b)(3) motions initially highlighted Cardiac Science's failure to comply with Local Rule 7.3.^{FN5}

In opposing these motions, Cardiac Science cited the court's summary judgment determination that its "license rights to Plaintiff's asserted intellectual properties are in full force and effect." (Dkt. No.

113, Cardiac Science's Mem. Opp'n Pl.'s Mot. Relief from TRO Ruling 2; Dkt. No. 114, Cardiac Science's Mem. Opp'n Pl.'s Mot. Relief from Summ. J. 2.) Cardiac Science also claimed that Plaintiff had not shown misconduct, by clear and convincing evidence, that prevented the full and fair preparation or presentation of the case.

On June 20, 2006, the court noted that since obtaining summary judgment on Plaintiff's claims and its declaratory judgments, Cardiac Science had taken no action concerning its other counterclaims, which sought monetary damages or equitable relief. Accordingly, the court ordered Cardiac Science to file a status report informing the court whether it would continue to pursue such relief. In response, Cardiac Science filed a motion voluntarily to dismiss these counterclaims without prejudice, which the court allowed on July 17, 2006.

*5 On July 24, 2006, the First Circuit dismissed, without prejudice, Plaintiff's appeal of this court's June 23, 2005 order allowing Cardiac Science's motion for summary judgment. *See Hutchins v. Cardiac Science, Inc.*, No. 05-2182, slip op. (1st Cir. July 24, 2006) ("An order granting summary judgment on claims against one party is not appealable as a final judgment because it does not finally dispose of all rights of all parties." (citing 28 U.S.C. § 1291)).

Finally, on August 4, 2006, Plaintiff filed the pending motion for sanctions against counsel for Cardiac Science based on Attorney Skaar's conversations with counsel for Compliant and his failure to disclose the sale of Plaintiff's intellectual property to Aristotle. In response, Cardiac Science claimed that Plaintiff's conspiracy allegation was baseless and that its representatives had not deceived the court. No satisfactory explanation was offered in these papers for Cardiac Science's repeated claims that it possessed license rights that it knew had been transferred to a third party.

III. DISCUSSION

A. Plaintiff's Motion for Relief from the Court's September 28, 2005 Order Denying Plaintiff's

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Emergency Motion for a Temporary Restraining Order (Dkt. No. 107).

As stated above, Plaintiff seeks relief from this court's previous refusal to order Cardiac Science to: (1) pay Plaintiff all past due royalty payments; (2) reimburse Plaintiff for patent license fees; (3) meet all the ongoing requirements as the Licensee; and (4) transfer to Plaintiff the common stock shares and funds received by Cardiac Science as part of the June 28, 2004 demand for indemnity it served upon Complainant.

In support of his original Rule 60(b)(3) motion, Plaintiff stressed Cardiac Science's failure to inform Plaintiff or the court of its dissolution. While Cardiac Science has yet to make good on its stated intention to file an updated corporate disclosure statement reflecting its name change and merger with another entity (see Cardiac Science's Mem. Opp'n Pl.'s Mot. Relief from TRO Ruling 3-4), this failure to comply with Local Rule 7.3 plainly did not interfere with Plaintiff's application for preliminary injunctive relief.^{FN6}

The closer question is whether Cardiac Science's misrepresentation regarding its status as the Licensee deprived Plaintiff of a fair hearing on his motion and entitles him to relief from the court's decision.

[1] To prevail on a Rule 60(b)(3) motion, a movant must establish, among other things, that an alleged misrepresentation prevented him from fully and fairly presenting his case. *See Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 135 (1st Cir.2005). Although it now appears clear Cardiac Science did misrepresent itself as the Licensee, this misrepresentation did not compromise the court's ruling denying Plaintiff's motion for a temporary restraining order.

[2] In order to allow a motion for preliminary relief, a court must conclude that the movant is likely to obtain ultimate judgment on the merits. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 54 (1st Cir.2000) ("[A] demonstrated likelihood of success on the merits is a 'sine qua non' of

preliminary injunctive relief in this circuit." (citation omitted)). In this case, Plaintiff's first three requests for relief had no grounding in any underlying claim.

*6 As previously noted, Plaintiff's amended complaint asserts claims against Cardiac Science for copyright and patent infringement, abuse of process, and tortious interference with contract. Despite the fact that the amended complaint did not set forth a breach of contract claim against Cardiac Science, Plaintiff, in his motion for a temporary restraining order, asked for an order compelling Cardiac Science to fulfill its contractual obligations. Because Plaintiff was unlikely to succeed on a theory he had not set forth in his amended complaint, the court correctly denied Plaintiff's motion with respect to his first three requests for preliminary relief.

[3] As for the fourth request, because Plaintiff did not appear to be entitled to any of the proceeds Cardiac Science conveyed to Complainant pursuant to the APA, he was not likely to be able to demonstrate at the ultimate trial that he was entitled to any stock or funds Complainant conveyed to Cardiac Science pursuant to Cardiac Science's demand for indemnity. The fact that Cardiac Science responded to Plaintiff's suit by serving Complainant with a demand for indemnity, which Complainant paid, is not, as Plaintiff suggests, "tantamount to an admission by both Cardiac Science and Complainant as to the veracity of [Plaintiff's] claims." (Pl.'s Mem. Supp. Emergency Mot. TRO 5.)

In short, the misrepresentations by Cardiac Science in no way affected the court's decision on Plaintiff's emergency motion for a temporary restraining order. Reconsideration of this ruling is therefore not called for.

B. Plaintiff's Motion for Relief from the Court's June 23, 2005 Order Allowing Cardiac Science's Motion for Summary Judgment (Dkt. No. 108).

As stated above, on June 23, 2005, the court allowed Cardiac Science's motion for summary

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judgment on every claim brought against it by Plaintiff and every declaratory judgment claim brought by Cardiac Science against Plaintiff. After the court denied Plaintiff's motion for relief from this ruling pursuant to Fed.R.Civ.P. 60(b)(1) and (2), Plaintiff filed the pending motion, which seeks relief from the June 23, 2005 order under Fed.R.Civ.P. 60(b)(3).

Cardiac Science takes the position that Rule 60(b) relief is improper due to the fact that certain claims involving Plaintiff and Complainant are still pending. "It is ... well settled that Rule 60 applies only to final judgments." *Farr Man & Co., Inc. v. M/V Rozita*, 903 F.2d 871, 874 (1st Cir.1990) (citations omitted). Because Complainant's counterclaims against Plaintiff have yet to be resolved and the court's allowance of summary judgment on Cardiac Science's behalf was never certified as a final judgment, this ruling was interlocutory pursuant to Fed.R.Civ.P. 54.

[4] Of course, the fact that the June 23, 2005 order was interlocutory does not negate this court's authority to reconsider it. On the contrary, such an order is "subject to the district court's discretionary power to alter it at any time prior to the entry of the final decree." *Id.* at 875; *see also Jusino v. Zayas*, 875 F.2d 986, 990 n. 3 (1st Cir.1989) ("The inherent power of a court to correct, within a reasonable time, a manifest error in its own interlocutory order was not completely displaced by the adoption of the Civil Rules." (citations omitted)).

*7 [5] Here, as noted, Cardiac Science's misrepresentation appears conceded. Its repeated and knowingly false assertion that it possessed the license rights at issue was at the core of its motion for summary judgment. Based on this, the court lacks confidence in its ruling on the motion for summary judgment and, upon reconsideration, will deny it. For all the court can discern at this point, Cardiac Science "has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly ... unfairly hampering the presentation of [Plaintiff's] claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989); *see also Pearson v. First NH Mortgage*

Corp., 200 F.3d 30, 37 (1st Cir.1999) (indicating that intentionally preventing the court "from knowing all the facts necessary to make an appropriate judicial decision on the matter before it" may be grounds for Rule 60(b)(3) relief (citations omitted)).

Cardiac Science now contends that it "never misrepresented the present ownership of the 1994 Hutchins License Agreement. The IP assets were transferred to Aristotle Corporation in August of 2004 and Cardiac Science retained the obligation to defend this lawsuit by Hutchins." (Skaar Decl. ¶ 2.)

This explanation flies in the teeth of Cardiac Science's explicit representations. From the onset of this litigation, Cardiac Science has, without equivocation, represented itself to be the Licensee (*see* Dkt. No. 8, Cardiac Science's Mem. Opp'n Pl.'s Mot. TRO 2 ("Cardiac Science is the exclusive licensee of the intellectual property at issue and cannot be an infringer.")) and claimed to be abiding by the terms of the Licence (Cardiac Science's Mem. Supp. Mot. Summ J. 3 ("Cardiac Science has met and *is meeting* the terms and obligations of the License Agreement.")) (*emphasis added*.) Cardiac Science's new-found agnosticism concerning whether the current Licensee, Aristotle, "has paid or owes Plaintiff any royalties" (Skaar Decl. ¶ 5) is inconsistent with past representations. Moreover, its concealment of the true licensing arrangement interfered with the court's ability to "impartially ... adjudicate a matter." *Aoude*, 892 F.2d at 1118.

Evidence of Cardiac Science's status as a *former* Licensee would obviously have been invaluable in opposing Cardiac Science's request for a declaration that it is the *current* Licensee. Such evidence would have also completely undermined Cardiac Science's only articulated defense to Plaintiff's infringement claims, *i.e.*, that its rights under the License Agreement constituted a valid affirmative defense.

Evidence that Cardiac Science concealed the identity of the true Licensee would have also provided much needed ballast to Plaintiff's allegation that Cardiac Science's counterclaims, far from being compulsory, were filed for the ulterior purpose of "intimidat[ing] Plaintiff, diminish[ing]

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his resources and destroy[ing] his will to defend his intellectual properties." (Am.Compl.¶ 66.)^{FN7}

*8 Finally, while Cardiac Science's misrepresentations did not constitute or conceal a tortious interference with Plaintiff's contract with Compliant, such misconduct certainly seems to have interfered with Plaintiff's contract with Aristotle. Unlike Compliant, which merely sold Plaintiff's intellectual property to Cardiac Science without informing him, Cardiac Science sold Plaintiff's intellectual property to Aristotle and actively concealed that any such sale occurred.

In short, the consequences of Cardiac Science's misconduct have hardly been "nugacious." See *Klonoski v. Mahlab*, 156 F.3d 255, 275 (1st Cir.1998) ("[I]f the movant can successfully demonstrate that the misconduct was knowing or deliberate ... a presumption of substantial interference arises," which can only be defeated "by a clear and convincing demonstration that the consequences of the misconduct were nugacious." (citation omitted)), cert. denied, *Mary Hitchcock Memorial Hosp. v. Klonoski*, 526 U.S. 1039, 119 S.Ct. 1334, 143 L.Ed.2d 498 (1999).^{FN8} With no lesser remedy reasonably effective, the court will vacate its June 23, 2005 ruling in favor of Cardiac Science.

C. Plaintiff's Motion for Sanctions Against Counsel for Cardiac Science (Dkt. No. 191).

Having vacated its ruling on Cardiac Science's motion for summary judgment, the court sees no reason further to sanction counsel pursuant to Local Rule 1.3. It is not clear at this point whether counsel himself was responsible for the misrepresentation, or was relying on misinformation supplied to him by his client. The court may return to this issue at a later date.

IV. CONCLUSION

Based on the foregoing, the court hereby: DENIES Plaintiff's Motion for Relief from the Court's September 28, 2005 Order Denying His Emergency

Motion for a Temporary Restraining Order (Dkt. No. 107); (2) ALLOWS Plaintiff's Motion for Relief from the Court's June 23, 2005 Order Allowing Cardiac Science's Motion for Summary Judgment (Dkt. No. 108); and (3) DENIES Plaintiff's Motion for Sanctions Against Counsel for Cardiac Science (Dkt. No. 191).

The clerk will set this case for a status conference to determine further proceedings.

It is So Ordered.

FN1. The origins of Plaintiff's dispute with Compliant were documented in great detail in a recently issued memorandum and order. See *Hutchins v. Cardiac Science, Inc.*, C.A. No. 04-30126-MAP, 2006 WL 2789866 (D.Mass. Sept.27, 2006). Because Plaintiff's dispute with Cardiac Science is based, in part, on Plaintiff's 1994 agreement with Compliant's progenitor, many of the facts provided in the Background section of the recently issued memorandum and order will be set forth here as well.

FN2. CPR Prompt® is the embodiment of U.S. Patent No. 4,583,524 ("the 524 patent"), which the U.S. Patent and Trademark Office ("PTO") issued to Plaintiff on April 22, 1986. The device is also claimed in U.S. Patent Reexamination No. 34,800 ("the 800 patent"), which the PTO issued to Plaintiff on November 29, 1994. In addition, Plaintiff owns U.S. Patent No. 5,913,685 (filed June 24, 1996) (issued June 22, 1999) ("the 685 patent"), which discloses an electronic device "to provide guidance to rescue personnel trained in CPR for resuscitating a victim under an emergency condition." 685 patent, col.9 ll.46-48.

Plaintiff also holds one trademark registration—"CPR Prompt"—and two copyright registrations-U.S. Copyright No. TX-u-210-208, which covers the device's script and word list, and U.S. Copyright

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No. TX-u-213-859, which pertains to its assembler software program—that are relevant to this litigation.

FN3. On July 28, 2004, Cardiac Science issued a demand for indemnity to Complainant based on Plaintiff's complaint.

FN4. Ultimately, the court allowed Cardiac Science's motion to dismiss with respect to Plaintiff's negligence claims, but otherwise denied it.

FN5. This provision requires corporate litigants to "file a statement identifying any parent corporation and any publicly held company that owns 10% or more of the party's stock" and "promptly supplement the statement upon any change in the information that the statement requires." Local Rule 7.3.

FN6. That being said, the court hereby orders Cardiac Science to file an updated corporate disclosure statement should the circumstances of its merger and/or name change implicate the dictates of Local Rule 7.3.

FN7. *Cf. Hull v. Municipality of San Juan*, 356 F.3d 98, 102 (1st Cir.2004) (finding the "unfairness" to be "two-fold" in case where plaintiff provided false information about an issue "peculiarly within [his] privileged control").

FN8. It also bears noting that the misconduct of Cardiac Science has prompted Plaintiff to file his ninth suit in this court. (See *Hutchins v. Aristotle Corp.*, 06-cv-30140-MAP.)

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Briefs and Other Related Documents (Back to top)

- 2006 WL 2919902 (Trial Pleading) Amended Complaint (Aug. 2, 2006)

- 2006 WL 353395 (Trial Motion, Memorandum and Affidavit) Defendant Complainant Corporation's Memorandum in Opposition to Plaintiff's Motion for Joinder of Parties (Jan. 3, 2006) Original Image of this Document (PDF)
- 2005 WL 3534880 (Trial Motion, Memorandum and Affidavit) Defendant Cardiac Science's Memorandum of Law in Opposition to Plaintiff's Motion for Relief from Summary Judgment Pursuant to Rule 60(b)(3) and Local Rule 7.3(b) (Nov. 13, 2005) Original Image of this Document (PDF)
- 2005 WL 3534879 (Trial Motion, Memorandum and Affidavit) Defendant Cardiac Science's Memorandum of Law in Opposition to Plaintiff's Motion for Relief from Order Pursuant to Rule 60(b)(3) and Local Rules 7.1(2) and 7.3(B) (Nov. 3, 2005) Original Image of this Document (PDF)
- 2005 WL 2454499 (Trial Motion, Memorandum and Affidavit) Plaintiff Donald C. Hutchins' Opposition to Defendant's Motion for Summary Judgment (Aug. 24, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 2454497 (Trial Pleading) Plaintiff, Donald C. Hutchins' Answer and Affirmative Defenses to Counterclaims (Aug. 22, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 2454498 (Trial Motion, Memorandum and Affidavit) Motion to Compel Defendant, Complainant Corporation to Withdraw All Forged Filings and to Re-File with Corrected Filings that Comply with Rule 11(a) Signing and Rule 11(b) Representations to Court (Aug. 22, 2005) Original Image of this Document with Appendix (PDF)
- 2004 WL 2195406 (Trial Motion, Memorandum and Affidavit) Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Strike and in Reply to Plaintiff's Opposition to the Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Sep. 7, 2004) Original Image of this Document (PDF)
- 2004 WL 2195403 (Trial Motion, Memorandum and Affidavit) Memorandum of Law in Support of Plaintiff's Motion for Joinder Under R. 19(a)(1) and R. 19(a)(2)(ii) of Civil Procedure (Sep. 2, 2004) Original Image of this Document (PDF)
- 2004 WL 2195396 (Trial Motion, Memorandum and Affidavit) Plaintiff's Motion to Strike and

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Memorandum in Opposition to Defendant's Amended Motion to Dismiss Under R 12(b)(1) and 12(b)(6) of Civil Procedure (Aug. 31, 2004) Original Image of this Document with Appendix (PDF)

- 2004 WL 2195392 (Trial Motion, Memorandum and Affidavit) Defendant's Memorandum of Law in Opposition to Plaintiff's Second Motion for a Temporary Restraining Order (Aug. 24, 2004) Original Image of this Document with Appendix (PDF)
- 2004 WL 2195389 (Trial Motion, Memorandum and Affidavit) Defendant's Amended Memorandum of Law in Support of Its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Aug. 23, 2004) Original Image of this Document (PDF)
- 2004 WL 2195384 (Trial Motion, Memorandum and Affidavit) Defendant's Memorandum of Law in Opposition to Plaintiffs Motion for a Temporary Restraining Order (Aug. 20, 2004) Original Image of this Document (PDF)
- 2004 WL 2195386 (Trial Motion, Memorandum and Affidavit) Defendant's Memorandum of Law in Support of Its Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Aug. 20, 2004) Original Image of this Document (PDF)
- 2004 WL 2195380 (Trial Pleading) Complaint (Jul. 2, 2004) Original Image of this Document (PDF)

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EXHIBIT 2



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Briefs and Other Related Documents
 Cronin v. Commonwealth of Massachusetts D.Mass., 2004. Only the Westlaw citation is currently available.

United States District Court, D. Massachusetts.
 Suzanne CRONIN

v.

THE COMMONWEALTH OF
 MASSACHUSETTS, Phillip Lindsay and George
 Haroutunian
No. Civ.A. 03-11749-RGS.

Feb. 5, 2004.

H. Brooks Wheland, Somerville, MA, for Plaintiff.
 Peter Francis Russell, Massachusetts Attorney General's Office, Boston, MA, Joseph P. Kittredge, Law Offices of Timothy M. Burke, Needham, MA, for Defendants.

**MEMORANDUM AND ORDER ON PLAINTIFF'S
 MOTION TO RECONSIDER**

STEARNS, J.

*1 The following facts are relevant. On June 27, 2003, the underlying complaint was filed in the Massachusetts Superior Court, asserting among other claims, causes of action based on 42 U.S.C. § 1983. On September 11, 2003, the case was removed to the federal district court on federal question grounds. On November 13, 2003, a motion to dismiss was filed by the Commonwealth of Massachusetts, the Superintendent of the State Police, and the Registrar of Motor Vehicles (the latter sued in their official capacities), and George Haroutunian, an administrative law judge assigned to the Registry of Motor Vehicles. District Court Local Rule 7.1(B)(2) required plaintiff, absent the grant of an enlargement of time, to file an opposition to the motion to dismiss within fourteen days. As of December 22, 2003, no opposition had been filed or extension sought. The court consequently allowed the motion to dismiss.

On January 12, 2004, plaintiff's counsel filed the instant motion to reconsider, citing his unawareness of the pendency of the motion to dismiss as the explanation for his failure to file an opposition. Among the factors a court is directed to consider in ruling on a motion for reconsideration of a dismissal order entered because of a plaintiff's failure to file a timely opposition are the reasons for the tardiness, the degree of prejudice the allowance of the motion would cause to the non-moving party, and "whether the belated filing would, in any event, be more than an empty exercise." *United States v. Roberts*, 978 F.2d 17, 22 (1st Cir.1992). The court may also consider its institutional interest in preserving the integrity of its rules of procedure. "Valid local rules are an important vehicle by which courts operate. Such rules carry the force of law, ... and they are binding upon the litigants and upon the court itself." *Air Line Pilots Association v. Precision Valley Aviation, Inc.*, 26 F.3d 220, 224 (1st Cir.1994). A district court has "great leeway in the application and enforcement of its local rules." *Roberts*, 978 F.2d at 20. See also *Ramsdell v. Bowles*, 64 F.3d 5, 8 (1st Cir.1995) (court properly struck opposition to summary judgment filed one day late under District of Maine Local Rules). "[I]t is within the district court's discretion to dismiss an action based on a party's unexcused failure to respond to a dispositive motion when such response is required by local rule, at least when the result does not clearly offend equity." *Nepsk, Inc. v. Town of Houlton*, 283 F.3d 1, 7 (1st Cir.2002).

Here, counsel's admitted inattention falls far short of any showing of an excusable failure on his part. A litigating attorney has a duty to monitor the progress of his case on the court's docket and cannot delegate that responsibility to the court or to opposing counsel. *Davila-Alvarez v. Escuela de Medicina Universidad Central del Caribe*, 257 F.3d 58, 64-65 (1st Cir.2001). While any prejudice to the defendants that would result from granting the motion to reconsider is not large (given the early stage of the proceedings), it is doubtful that

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consideration of plaintiff's belated opposition to the motion to dismiss would alter the result. Under the Sovereign Immunity Clause of the Eleventh Amendment, a state, its agencies, and agency officials acting in their official capacities are not "persons" subject to suit under section 1983 for money damages, either in state or federal court. *Will v. Michigan Department of State Police*, 491 U.S. 58, 65-67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Woodbridge v. Worcester State Hospital*, 384 Mass. 38, 44-45 & n. 7, 423 N.E.2d 782 (1981); *Laubinger v. Department of Revenue*, 41 Mass.App.Ct. 598, 601-602, 672 N.E.2d 554 (1996). The same grant of immunity from suit applies to actions brought under the Massachusetts Civil Rights Act. *Commonwealth v. Elm Medical Laboratories, Inc.*, 33 Mass.App.Ct. 71, 76, 596 N.E.2d 376 (1992). Finally, a state official performing a judicial function is absolutely immune from suit for his adjudicatory acts. *Butz v. Economou*, 438 U.S. 478, 509, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (administrative law judges); *Johnson v. Rhode Island Parole Board Members*, 815 F.2d 5, 7-8 (1st Cir.1987) (parole board members); *Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 701 (1st Cir.1995) (members of a medical disciplinary board). Cf. *Comins v. Sharkansky*, 38 Mass.App.Ct. 37, 39, 644 N.E.2d 646 (1995) (arbitrators exercising judicial functions).

*2 The remaining claims insofar as they implicate the official defendants fare no better. While the Massachusetts Tort Claims Act, G.L. c. 258, § 1 et seq., permits the substitution of the Commonwealth as a defendant in cases involving torts committed by its employees, the Act does not cover intentional torts. *Id.*, § 10(c). See *MacLean v. Delinsky*, 407 Mass. 869, 878 n. 6, 556 N.E.2d 60 (1990). The claims asserted against Trooper Lindsay fall within the category of intentional torts and are therefore not redressable under the Act. The allegation that plaintiff's civil rights were violated by the failure of Registry of Motor Vehicle officials (assuming that the Registry is not an "arm of the state" immune from suit) to follow proper procedures in suspending her driver's license is not actionable under the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H, I, absent a plausible pleading of "

threats, intimidation, or coercion." *Longval v. Commissioner of Correction*, 404 Mass. 325, 332-333, 535 N.E.2d 588 (1989). Cf. *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico*, 322 F.3d 56, 68 (1st Cir.2003). Indulging the same assumption that the State Police is a proper "person" subject to suit under the Civil Rights Act, it cannot be sued on a theory of respondent superior for violations committed by employees acting outside the lawful scope of their employment.^{FN1} Cf. *Sarvis v. Boston Safe Deposit and Trust Co.*, 47 Mass.App.Ct. 86, 97, 711 N.E.2d 911 (1999). The allegations directed against Trooper Lindsay are beyond the rim of any plausible description of his official duties. Finally, the Commonwealth and its officials are not subject to suit under G.L. c. 214, § 1B, for the disclosure of information properly in their possession. *Opinion of the Justices*, 423 Mass. 1201, 1235, 668 N.E.2d 738 (1996).^{FN2}

FN1. Count XIV, which alleges that the State Police violated plaintiff's rights to due process under the "Articles of Man" (presumably the Declaration of Rights) and the laws of Massachusetts, appears to be based on the same theory of vicarious liability.

FN2. It is not clear whether plaintiff is objecting to information about her arrest being disseminated in the official records of the criminal justice system, or to the use of the same information by the prosecutor at her trial. If the latter, the litigation privilege precludes any cause of action. See *Doe v. Nutter, McClellan & Fish*, 41 Mass.App.Ct. 137, 140-141, 668 N.E.2d 1329 (1996).

In sum, sustaining the dismissal does not offend equity as plaintiff's attempt to cast a net over the official defendants is a largely hopeless undertaking. She may object to the summary disposition of a substantial portion of her case by a federal court, rather than having it resolved by the courts of Massachusetts where she originally filed suit, but it was her choice to bring a cause of action

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under 42 U.S.C. § 1983, thus creating the grounds for removal. While the usual practice is to remand supplemental claims upon the dismissal of foundational federal claims, *see Camelio v. American Federation*, 137 F.3d 666, 672 (1st Cir.1998), I see no reason to do so here where the reason for the dismissal is by way of a sanction for the failure to observe the court's rules and where the surviving federal claims against Trooper Lindsay would result in an awkward splitting of an action where all claims arise out of the same nucleus of common facts. *See Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-257 (1st Cir.1996). FN3

FN3. Plaintiff is correct that the motion to dismiss does not run to defendant Phillip Lindsay. The Clerk will restore that portion of the case that involves Trooper Lindsay to the active docket.

ORDER

For the foregoing reasons, the motion for reconsideration is *DENIED*.

SO ORDERED.

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